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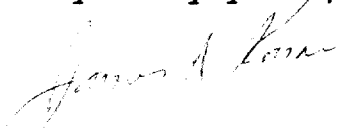
Re: MM Docket 93-107

Dear Mr. Caton:

On behalf of AFS Broadcasting Corporation, an applicant in the above-referenced proceeding, there are transmitted herewith an original and 11 copies of its Exceptions to the Initial Decision rendered in the proceeding.

Should additional information be necessary in connection with this matter, please communicate with this office.

Very truly yours,


James A. Koerner
Counsel for
AFS Broadcasting Corporation

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Before the
Federal Communications Commission
Washington, D.C. 20554

DEC 20 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Application of
DAVID A RINGER, et al.

) MM Docket No. 93-107
) File Nos. BPH-911230MA

For Construction Permit for
New FM Station on Channel 280A
at Westerville, Ohio

)
)
)
)

TO: The Review Board

EXCEPTIONS OF ASF BROADCASTING CORPORATION

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December 20, 1993

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SUMMARY

Five applicants remain in this comparative hearing for a construction permit for revival of the FM station which previously served Westerville, Ohio. Although the presiding Administrative Law Judge denied a petition to enlarge issues against Shellee F. Davis, the winning applicant below, it is clear financial qualifications issues should have been added since her financial qualifications were based totally upon accommodation letters issued by a bank with which she had very limited previous experience.

The presiding Administrative Law Judge erred in giving ASF Broadcasting Corporation a substantial demerit under the diversification criterion. FCC precedent is clearly to the contrary.

Although the Court of Appeals has cast substantial doubt, to say the least, upon the continued vitality of the integration policy, ASF believes that any common sense approach which may alleviate some of the Court's concerns dictates a grant of the ASF application.

STATEMENT OF THE CASE

Five applicants remain in contention for a construction permit to revive the signal of former station WBBY at Westerville, Ohio -- a station that went dark pursuant to FCC direction on December 31, 1991.

During the proceeding, the presiding Administrative Law Judge ("ALJ") denied a number of requests for addition of issues, including financial qualifications issues against Shellee F. Davis ("Davis"). (FCC 93M-609, released September 23, 1993).

Under the comparative criteria, the ALJ dealt ASF Broadcasting Corporation ("ASF") a substantial diversification demerit. Initial Decision ("ID") Findings 15, 19; Conclusions 4, 5. Four of the five applicants were given the 100% integration credit sought. On the basis of qualitative enhancements, Davis was deemed to be the comparative winner.

QUESTIONS PRESENTED

- I. Whether financial qualifications issues should have been added against Davis for her reliance upon bank letters that were strictly an accommodation.
- II. Whether the ALJ erred in concluding that ASF should suffer a substantial (but not decisionally significant) comparative demerit under the diversification criterion.
- III. Whether ASF should be preferred under the "best practicable service" criterion.

ARGUMENT

I. ISSUES SHOULD HAVE BEEN ADDED TO INQUIRE INTO DAVIS' FINANCIAL QUALIFICATIONS

One of the applicants, Wilburn Industries, Inc. ("Wilburn"), sought to have the issues enlarged against Davis on the ground that the letters from Huntington National Bank, Columbus, Ohio -- on which Davis relied for her financial qualifications -- were merely "accommodation letters" which failed to satisfy the Commission's requirements. This request was based upon the deposition testimony of Shellee F. Davis. The petition was denied, primarily on grounds that it was untimely. The ALJ's Memorandum Opinion and Order (FCC 93M-609) disposing of the petition discussed the amount of available funds claimed by Davis, as well as her budgeted costs. However, it did not address the allegations that the Huntington Bank issued only accommodation letters.

The Commission's position with respect to bank letters is, by now, cut and dried. In Merrimack Valley Broadcasting, Inc., 82 FCC 2d 166, 167 (1980), the Commission specified that the standard is "a present firm intention to make a loan, future conditions permitting...". The factors which determine the existence of the present firm intention were succinctly stated in Liberty Productions, 7 FCC Rcd 7581, 7584 (1992). They are: (a) whether the applicant's qualifications have been reviewed by the bank; (b) whether adequate collateral for the loan is available, and (c) whether the terms and

conditions of the loan are identified and acceptable to borrower and lender.

Drawing upon other precedent, the Review Board expounded upon these basic factors in Scioto Broadcasters, 5 FCC Rcd 5158, 5160-61 (Rev. Bd. 1990).¹ For example, review of present qualifications can be replaced by the bank's thorough familiarity with the applicant's assets, credit history, business plan, etc. Multi-State Communications, Inc. v. FCC, 590 F.2d 1117 (D.C. Cir. 1978).

Here, the identical loan request was made of two banks -- Huntington National Bank and Bank Ohio. (Davis Dep. at 41, 43, 60). The applicant's only previous contact with Huntington was maintenance of a personal money market account. (Davis Dep. at 46). The applicant's business accounts were with Bank Ohio. (Davis Dep. at 46-47). Perhaps not surprisingly, Bank Ohio would not issue the requested letter without receiving additional information. (Davis Dep. at 41). On the other hand, Huntington Bank wanted more of the applicant's business. (Davis Dep. at 44). Ms. Davis did prepare a personal financial statement and presented it to the bank on Christmas Eve, 1991. (Davis Dep. at 45-46). Three days later, on December 27, she had a letter expressing interest in providing financing in the amount of \$250,000.00.

¹Interestingly, the bank which issued the complying letter in Scioto, is the same bank -- Huntington National Bank -- which issued a vastly different letter in the present case.

Later, that amount was increased to \$350,000.00. At no time did the applicant provide any additional information to Huntington Bank. (Davis Dep. at 48.)

It is clear that Huntington Bank had virtually no knowledge of Davis' financial qualifications, past business record, credit history, or business plan, prior to issuing the letter.

The second factor for reasonable assurance is adequate collateral. Huntington's letter calls for a pledge of physical and intangible assets of the station and a secured personal commitment as collateral. Ms. Davis had no actual realization of what intangible assets might be involved, but assumed possibly accounts receivable. (Davis Dep. at 57-58). She had less idea of what might constitute a secured personal commitment. (Davis Dept. at 58-59). Most of the physical assets will be leased, not owned.

Finally, both borrower and lender must agree upon the essential terms and conditions. Huntington Bank requires FCC grant of an authorization. Presumably, this presents no problem. The bank also requires that the borrower meet all reasonable and ordinary credit criteria. Ms. Davis had no discussion as to those credit criteria. (Davis Dep. at 51). The bank requires "appropriate management and staff to run the station." She had no discussion about what that meant. However, Ms. Davis has no broadcast experience, nor did she identify any future staff with such experience. Lastly, she

was not certain whether or not she would "mortgage [her] house and all that kind of stuff." (Davis Dep. at 58-59).

The Board was faced with a somewhat similar situation in Praise Broadcasting Network, 8 FCC Rcd 5457 (Rev. Bd. 1993). The borrower in that instance professed to have a personal, professional, and continuing relationship with the bank, and supplied it with his personal financial statement, but no business plan or other material. The Board held this to be insufficient to establish reasonable assurance. Further, the borrower was uncertain about the collateral and other terms and conditions. Accordingly, the Board there felt it necessary to remand for a determination of whether the bank letter under review was issued strictly as an accommodation. No less is required in this case.

II. ASF SHOULD NOT SUFFER A DIVERSIFICATION DEMERIT

ASF has no other media interests. (ASF Ex. 2). Its sole voting shareholder, Ardeth S. Frizzell, who holds 25% equity, has no media interests. (ID Finding 12). ASF's non-voting shareholder, Thomas J. Beauvais, owns 50% of The Patten Corporation, licensee of a station in Pinconning, Michigan, and 50% owner of a new station in Trussville, Alabama. He is also 50% owner of GTE Leasing, Inc., which owns 80% of a station in Grand Rapids. Mr. Beauvais also manages the station in Grand Rapids. (ID Findings 13, 14).

It is clear that Mr. Beauvais is a non-voting stockholder. Thus, his ownership interest in ASF is non-attributable.² As such, his attributable ownership interests in other stations are not attributable to ASF.³ On the other hand, the presiding ALJ found that ASF should suffer a substantial demerit because of those holdings. Yet, acknowledging Mr. Beauvais' non-attributable position, the ALJ found ASF to be entitled to the full 100% integration credit. (ID Conclusion 11).

The ALJ provided no rationale for recognizing Mr. Beauvais' non-attributable status for integration purposes, but ignoring it for diversification purposes. In fact, he erred. ASF should receive no demerit in this instance.

Even in Cleveland Television Corp., 91 FCC 2d 1129 (Rev. Bd. 1982), aff'd sub nom. Cleveland Television Corp. v. FCC, 732 F.2d 962 (D.C. Cir. 1984), the winning applicant was assessed only a slight diversification demerit where its non-voting shareholders (holding one-third of the equity) owned two radio stations in the same market, and the voting shareholders held distant broadcast interests. Here, the non-

²Mr. Beauvais is really only a banker to the applicant, with the opportunity to be bought out for a reasonable profit. The "borrower", however, has no right to sell out to the banker. It is a one-way street.

³The ALJ noted (ID fn 4) that ASF's Shareholders Agreement contained no restriction on Mr. Beauvais' future involvement. However, non-voting shareholders do not require the same type of insulation as limited partners. Attribution of Ownership Interests (Reconsideration), 58 RR 2d 604, 614 (1985).

voting shareholder has, perhaps, negative control of distant stations. No demerit is warranted.

III. ASF IS PREFERRED UNDER THE BEST PRACTICABLE SERVICE CRITERION

As an initial matter, ASF notes that the Commission's integration policy has been found arbitrary and capricious, and, therefore, unlawful. Bechtel v. FCC, Case No. 92-1378, decided December 17, 1993 (D.C. Cir.) ("Bechtel II"). The Court instructed the Commission to come up with a more reasonable method for awarding licenses. Perhaps it is not the integration policy itself that is flawed, but the manner in which it has come to be applied. As the Court noted, application of the policy has produced "strange and unnatural" results. Bechtel v. FCC, slip op. at 20-21, quoting Bechtel v. FCC, 957 F.2d 873, 880 (D.C. Cir. 1992) ("Bechtel I"). Here we are asked to believe that Shellee Davis, at the age of 37, will give up a lucrative, debt-free business that grossed \$1.2 million in 1991 and \$1.4 million in 1992, and provided income to her in excess of \$100,000 in 1992, in order to take on a mortgaged, small market radio station. (ID Finding 48, fn 5; Tr. 425-426).

One of the more arbitrary and capricious aspects of the integration policy is the concept of local residence. In this case, Davis, who lives within the station's 1 mv/m contour, but who works in Columbus, receives substantial credit, while

Ardeth Frizzell, who has lived in the same house all her life and who, while living there, managed the very station for which the license is sought, receives none.

The present concept of credit for living within the 1 mv/m contour appears to have begun with Waters Broadcasting Corp., 91 FCC 2d 1260 (1992), aff'd sub nom. West Michigan Broadcasting Co. v. FCC, 735 F.2d 601 (D.C. Cir. 1984), cert. den. 470 US 1027. Thus, in subsequent cases, the rule has been no local residence credit for residence outside the primary service area. See, e.g., Santee Cooper Broadcasting Co. of Hilton Head, Inc., 99 FCC 2d 781 (Rev. Bd. 1984) and subsequent cases.

Interestingly, the Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393 (1965), which set forth the standards for awarding licenses, contains no reference to the 1 mv/m contour or the primary service contour area. It states only that credit will be awarded for residence within the "service area", i.e., the area served (or to be served) by the station. The concept was that people who live in such areas are more likely to be aware of the needs and interests of the community than a distant owner. In fact, any owner proposing to work full-time at a station would, almost of necessity, have to live in the area.

Using the 1 mv/m contour as the arbitrary line between credit and non-credit produces anomalous results. For example, we are to believe that an owner of a Class C FM

station living 60 kilometers from the station is more aware of the community's needs and interests than the owner of a Class A FM station who lives 30 kilometers away. See 47 C.F.R. § 73.211. If a station uses a directional antenna, an owner's awareness of needs and interests would apparently depend upon whether he or she lived in the direction of the major lobe of radiation or of the null, distances being equal. The Court in Bechtel II gave other examples of the foolishness to which blind adherence to this policy has led.

Bechtel II acknowledges that the Commission's chore in selecting among competing applicants is not easy. (Slip op. at 21.) At the same time, a computer-programmable approach leads to nothing but shams and "strange and unnatural" arrangements. A bizarre, but possibly workable and legal, criteria is common sense. Just as the Commission looks askance at proposals to "give away the store,"⁴ it should look askance at any totality of facts which suggests that things are not as they seem. A determination of which applicant will provide the best practicable service may be subjective, but is not impossible.

Let us assume that "best practicable service" to the public is a worthy goal in awarding licenses. Let us further assume, the Bechtel II court notwithstanding, that a reliable, permanent (within reason) hands-on management-by-owners-who-

⁴KIST Corp., 102 FCC 2d 288, 292 (1985).

care-about-the-community approach is a means of achieving this goal. Analysis of the totality of facts and circumstances of each applicant in a given situation can produce a winner capable of achieving the goal.

A. David A. Ringer

David Ringer is primarily a real estate developer. While he has had some broadcast experience, in college and later, it has not been "hands on." He is part owner of a radio station, but his duties are primarily writing checks. He does live in the area served by the proposed station,⁵ and probably has a knowledge of the area's needs and interests. (Ringer Exs. 1, 2; Tr. 137, 157, 158-159). If he could make more money in the radio business than in land development, he would undoubtedly do more than write checks at the station he presently owns. In sum, while David Ringer would probably be a conscientious licensee, his proposal lacks the ring of permanence.

B. Wilburn Industries, Inc.

Wilburn Industries, Inc. ("Wilburn") is a two-tiered corporation. Its sole voting shareholder, Charles Wilburn, intends to retire from the practice of law to run a small town radio station. He has no broadcast experience, but is of retirement age and, presumably, has the wherewithal to live in retirement. In keeping with the local residence rubric, he

⁵This is not the same as the primary service area or 1 mv/m contour.

plans to move less than ten miles so that he will have residence within the city of license. (ID Findings 44-46; Tr. 321.)

When Wilburn first applied for this frequency -- without benefit of experienced communications counsel -- Charles Wilburn and his son, then an equal voting shareholder, each planned to work part-time at the station in assistant managerial capacities. Later, when communications counsel became involved, the ownership and management structure was amended to "fit the mold." Yet, it is Wilburn's intention to employ or retain a knowledgeable and long-time broadcaster, Nelson Embrey, to help out. (Tr. 294, 303, 304, 300-308, 364-365, 310-311, 312-313, 315).

Viewed in its totality, the Wilburn proposal as originally filed is probably close to the truth. Charles Wilburn will ease out of the practice of law. Nelson Embrey will essentially manage the station. Both Charles Wilburn and his son will visit the station on occasion -- Charles more frequently -- and both father and son will split profits and losses. Hands-on management by owners is not likely.

C. Shellee F. Davis

As noted, supra, Davis would have us believe that she will give up a lucrative position with a growing, debt-free company, which she owns, in order to manage a small town radio station saddled with a mortgage and at a salary less than one-third of her present income. Consider also the fact that her

husband and brother-in-law have made previous runs at the radio business. (Tr. 387-388, 425-426, 401, 404.)

The Bechtel II court noted that it was "forbidden to suspend [its] disbelief totally." (Slip op. at 23.) To believe Shellee Davis' proposal, takes a leap of faith. Common sense dictates that it will not be done.

D. Ohio Radio Associates, Inc.

Ohio Radio Associates, Inc. ("ORA") has acknowledged that it cannot prevail under the Policy Statement. It has indicated that it intends to challenge the integration standard. Its challenge now comes late. ORA intends absentee management of the station by owners who apparently have no experience in the broadcast industry.

ORA principals may be excellent business managers. However, that fact must be weighed against the positive attributes of the other applicants.

E. ASF BROADCASTING CORPORATION

ASF is a two-tiered corporation. Its sole voting shareholder, Ardeth S. Frizzell, has been in the radio business for twenty years. For the six years preceding the filing of this application, she worked at the very station here under consideration, as general manager during its last year. She sought to revive the station for the benefit of its other employees and listeners. Lacking the necessary funds, however, through a former co-worker and friend, she was able to find a financial backer willing to take a risk with a

potential reward for him. Ms. Frizzell has lived in the area all her life and has worked her way up in the radio business. She has a proven track record. (ID Finding 16; ASF Ex. 3; Tr. 178-180.)

IV. CONCLUSION

Any common sense approach to achieving the goal of best practicable service to the public would favor, among these five applicants, ASF. This is not to say there might not be a better qualified applicant who, for one reason or another, did not apply. However, looking at those who did apply and are presently seeking the license, the most likely hands-on manager on a permanent basis is Ms. Frizzell. Accordingly, the ASF application should be granted.

Respectfully submitted,

ASF BROADCASTING CORPORATION

By:


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CERTIFICATE OF SERVICE

I, Beverly L. Miller, a secretary in the law offices of Baraff, Koerner, Olender & Hochberg, P. C., do hereby certify that copies of the foregoing Exceptions of ASF Broadcasting Corporation were sent this 20th day of December, 1993, via first class mail, postage prepaid to the following:

James Shook, Esquire*
Federal Communications Commission
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Washington, D. C. 20554

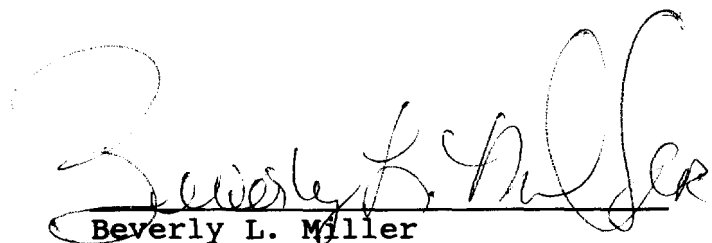
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